Statement of Eric Johnston
US Forest Service / Wetted perimeter methodology
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Chairman Vincent and members of the Water Policy Interim Committee, my name is Eric Johnston and I am the Assistant Director for Renewable Resources Management for Region One of the US Forest Service. I am based in Missoula, Montana.

Thank you for the opportunity to speak to your committee today. Along with Montana Fish, Wildlife and Parks and Montana Department of Natural Resources Conservation, we have been invited to participate in discussion of the wetted perimeter methodology.

It is my intent today to provide some background on how we arrived at an agreement with the State regarding the use of this methodology as currently codified in State law as part of the reserved water rights Compact between the State of Montana and the US Forest Service. The context for when and why the Forest Service uses the wetted perimeter methodology is very important.

After nearly two decades of challenging negotiations, the State of Montana and the Forest Service finalized a water rights compact in 2007, settling for all time any and all claims to federal reserved water rights for National Forest System lands in the State of Montana. A reserved water right is a right under federal law for the amount of water necessary to fulfill the purposes of a federal reservation; in this case National Forests. They have a priority date that is the date the Forests were reserved from the public domain lands, usually in the early 1900's. Early on, both the United States and the State of Montana recognized that negotiating reserved water rights for the National Forests in Montana would be far preferable to litigating them.

The Compact we negotiated recognizes a variety of Forest Service reserved water rights, including those for administrative uses and emergency fire suppression. One of the most challenging aspects of our negotiations was resolving Forest Service claims for reserved water rights for instream flow for streams on National Forest System Lands. In the early 1990's the State and the Forest Service entered into a Memorandum of Agreement that would have resulted in Forest Service reserved instream flow rights at 750 quantification points across the National Forests in Montana. The Forest Service spent a couple years working on the calculation of flow for those rights, using an equation that the State had successfully used in its negotiations with the National Park Service. However, the Forest Service negotiations with the State of Montana later stalled and in 2005, the parties agreed to hire a mediator to help work through instream flow and other difficult issues.

With the help of the mediator, the parties soon made progress, recognizing that a point of agreement between the State and the Forest Service was the need for instream flows to support important fisheries in Montana. In other words, flows to support important fisheries and their habitat became the driver for Forest Service instream flow rights on National Forest System lands. However, the question remained how those instream flows would be characterized and calculated. While there are various methods that can and have been used to establish instream flow needs that conserve fish and their habitat, the State of Montana had already developed and successfully used the wetted perimeter method for just such a purpose. Consequently, the Forest Service agreed to use this method, developed and endorsed by the State, to establish Forest Service instream flows.

Montana Fish, Wildlife, and Parks had existing wetted perimeter data they had collected for 77 streams on National Forest System land that were of interest to the State. Those data were used to establish Forest Service instream flow rights in the compact for the streams where the data were collected. Additionally, the compact specified that the Forest Service could use the wetted perimeter method to acquire instream flow reservations for other streams on National Forest System lands that have important fisheries. The compact specifies that use of any other method requires additional negotiation and agreement by both the Forest Service and the State. Neither party has seen the need to invest time and resources into additional negotiation as the wetted perimeter method appears to be a well understood method that can be used to collect data and calculate flows needed to conserve fish in an efficient manner.

It is noteworthy that, in lieu of a federal reserved water right, the Forest Service agreed that both the 77 instream flow rights in the compact and any future additional instream flow rights the Forest Service acquires under the Compact would be recognized under State, not federal, law. We agreed that future Forest Service instream flow rights would be called state reservations, a type of right that State law already recognized for the maintenance of a minimum flow, level or quality of water. Significantly, the Forest Service agreed to a 2007 priority date for the 77 instream flow rights identified in the compact and a priority date that coincides with the date of application for any additional water reservations acquired using the process specified in the compact. Thus, a Forest Service instream flow reservation is junior to any other water right or permit in existence at the time it is established. Also, of note, the compact requires a public notification and objection process for Forest Service instream water reservations applied for under state law.

Prior to the Montana Legislature's ratification of the Forest Service/Montana water rights Compact, the State and the Forest Service solicited public comment on the draft negotiated settlement through a variety of means; for example mailings, web postings, and public meetings and open houses. The public meetings and open houses were held in 17 communities across the State of Montana. The compact was passed with overwhelming support during the 2007 Montana legislative session. Since it was completed and signed into law by the Governor, the Forest Service has worked closely with the State to successfully implement the terms of the compact, including using the wetted perimeter method to collect data and apply for state-based instream flow reservations. It has been my agency's experience that the Montana Department of Natural Resources Conservation as well as the Department of Fish, Wildlife and Parks have been great partners to work with.

I hope I have been able to address some of the apparent confusion on the part of some regarding why the Forest Service uses this agreed-upon methodology at the request of the State, and how it has come to be codified in the water compact between the State and the US Forest Service. I, along with Regional Water Rights Team leader Jed Simon will be available for questions. Thank you.